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## THE QUIET ARMY: FELON FIREARM RIGHTS RESTORATION IN THE FOURTH CIRCUIT

Robert Luther III\*

### ABSTRACT

Most states afford felons the opportunity to have their political disabilities removed or “rights restored” after they are released from incarceration. In every state within the jurisdiction of the U.S. Court of Appeals for the Fourth Circuit, save Virginia, a felon’s rights are partially restored automatically upon the completion of his sentence, parole, and probation. Absent a pardon, Virginia requires the felon to petition the Governor in writing through the Office of the Secretary of the Commonwealth in order to obtain a partial restoration of rights.<sup>1</sup> One such right that may or may not be restored upon a state-convicted felon’s return to society is the right to ship, transport, possess, or receive firearms. While it is generally presumed to be illegal for felons to engage in any of those four activities in the states within the jurisdiction of the Fourth Circuit and nationwide, whether that is accurate in any specific case depends on a variety of factors including the scope of the rights restored by the state, the length of time the felon has conducted himself in a law-abiding manner, and any affirmative steps taken by the felon to remove any outstanding collateral firearms disabilities. Frequently, felons must take affirmative steps to secure a restoration of their firearm rights because most state restorations of political rights do not include the restoration of firearm rights, and even when a state restores some firearm rights, like the ability to use shotguns or rifles exclusively for hunting, the felon may still be subject to a federal firearm disability.

This Article discusses the restoration of firearm rights for felons and specifically addresses the methods by which individuals convicted of felonies under state law may

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<sup>1</sup> See VA. CONST. art. V, § 12 (bestowing upon the Governor the authority “to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution”). In July of 2013, Virginia Governor Robert F. McDonnell simplified the restoration process for non-violent felons. See Errin Whack, *Va. Ramps Up Restoration of Voting Rights for Some Ex-Felons*, WASH. POST (July 15, 2013), [http://www.washingtonpost.com/local/virginia-politics/restoring-voting-rights-of-some-va-ex-felons-ramping-up-at-end-of-mcdonnells-term/2013/07/15/62455f4a-ed69-11e2-a1f9-ea873b7e0424\\_story.html](http://www.washingtonpost.com/local/virginia-politics/restoring-voting-rights-of-some-va-ex-felons-ramping-up-at-end-of-mcdonnells-term/2013/07/15/62455f4a-ed69-11e2-a1f9-ea873b7e0424_story.html).

be relieved of collateral federal firearms disabilities in the Fourth Circuit, with a particular emphasis on the practice in Virginia.

This Article calls on the Fourth Circuit to make clear in an appropriate case that a defendant's "civil rights" have been restored under state law for purposes of 18 U.S.C. § 921(a)(20) if the state has also restored the defendant's right to possess firearms. Due to the Supreme Court of Virginia's interpretation of the Virginia Constitution in *Gallagher v. Commonwealth*,<sup>2</sup> which concluded that the governor lacked the authority to restore firearm rights and that only the state trial court could do so,<sup>3</sup> the Fourth Circuit's failure to construe 18 U.S.C. § 921(a)(20) as suggested will have the unintended and disparate effect of failing to relieve all state-convicted felons in Virginia from their collateral federal firearm disabilities. To read 18 U.S.C. § 921(a)(20) as not removing a federal firearms disability when the felon has received the unrestricted restoration of his firearm rights by a Virginia trial court would yield a perverse result because the purpose of this statute was to redirect the restoration process to the states. The longer this circuit proceeds without closing the door on this question, the longer attorneys unfamiliar with the nuances of federalism—but who have had their clients' firearm rights restored pursuant to the state judicial proceeding afforded under Virginia Code § 18.2-308.2(C)—may inadvertently risk subjecting their clients to the "terrifying force of the criminal justice system"<sup>4</sup> once again.

#### INTRODUCTION

Although most felony convictions are imposed by state courts, they frequently embody adverse, incidental, federal consequences. Title 18 U.S.C. § 922(g)(1), the federal "felon in possession" statute, is a principal example. It states:

It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.<sup>5</sup>

This statute plainly states that individuals convicted of felonies and many misdemeanants are barred from all physical contact with firearms. So are all felons barred from accessing firearms forever? Not necessarily. Even in the absence of a presidential or gubernatorial pardon, states including Virginia afford a proceeding under state law designed to relieve firearms disabilities of citizens who have erred in the past—often

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<sup>2</sup> 732 S.E.2d 22 (Va. 2012).

<sup>3</sup> *See id.* at 26.

<sup>4</sup> *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2185 (2010) (Roberts, C.J., dissenting), *dismissed as improvidently granted*.

<sup>5</sup> 18 U.S.C. § 922(g)(1) (2012).

in their youth and frequently by non-violent means—and who have emerged rehabilitated from the criminal justice system to become successful and law-abiding citizens.<sup>6</sup> Many of these rehabilitated individuals wish to again realize the full benefits of citizenship afforded through participation in the political process and the ability to acquire firearms, including inheriting a relative’s collection, for self-defense, to target shoot with their children, to hunt, or for myriads of other lawful purposes. However, the post-felony-conviction interplay between state rights-restoration processes and firearm disabilities law is nuanced and rife with ambiguity, so this path must be traversed with caution.

Because the conventional wisdom is that felons are the types of individuals who should be prohibited from physical contact with firearms—and because felons find few advocates in the political process—this is the first law review article to explore the legal landmines surrounding the firearm rights restoration process for convicted felons. In an attempt to help state-convicted felons and the attorneys who advise them avoid making bad decisions resulting from good-faith mistakes, this Article argues that the overwhelming weight of the evidence in the Fourth Circuit indicates that state-convicted felons who have had the ability to vote, hold office, and serve on a jury returned to them (by operation of law or, as in Virginia, upon written request to the governor through the Secretary of the Commonwealth) and who, where necessary, have taken affirmative steps to have their firearms rights restored in accordance with all other applicable state rights-restoration provisions (we’ll call them “rehabilitated state-convicted felons”), are relieved of the collateral federal firearm disability imposed by 18 U.S.C. § 922(g)(1) (the federal “felon in possession” statute) pursuant to the exception provided in 18 U.S.C. § 921(a)(20) and applicable Virginia law.

#### I. A VAGUE U.S. SUPREME COURT DECISION YIELDS VAGUE CIRCUIT COURT DECISIONS

The early 1990s saw the initial outpouring of state rights-restoration cases in U.S. courts of appeals, although only two reached the U.S. Supreme Court.<sup>7</sup> The first case to reach the high Court involved the consequences of a *federal* felony conviction,<sup>8</sup> but the second involved the consequences of a *state* felony conviction.<sup>9</sup> This distinction matters. We’ll start with the case dealing with *state* felony convictions first. *Caron v. United States* addressed a situation where a state-convicted felon’s rights were *partially* restored upon his release from incarceration.<sup>10</sup> Caron’s rights to shotguns and rifles

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<sup>6</sup> See *Restoration of Firearm Rights*, VIRGINIA STATE POLICE, [http://www.vsp.state.va.us/Firearms\\_Restoration.shtm](http://www.vsp.state.va.us/Firearms_Restoration.shtm) (last visited Oct. 23, 2014).

<sup>7</sup> See *Caron v. United States*, 524 U.S. 308 (1998) (state felony conviction); *Beecham v. United States*, 511 U.S. 368 (1994) (federal felony conviction).

<sup>8</sup> *Beecham*, 511 U.S. at 368.

<sup>9</sup> *Caron*, 524 U.S. at 308.

<sup>10</sup> *Id.* at 311.

were restored under state law, but state law forbade him from possessing handguns.<sup>11</sup> Despite being permitted by Massachusetts state law to possess certain types of firearms, the U.S. Attorney's Office charged him with violating 18 U.S.C. § 922(g)(1).<sup>12</sup> Although the federal district court agreed with Caron that his rights had been restored,<sup>13</sup> the First Circuit reversed, and the U.S. Supreme Court affirmed.<sup>14</sup>

The *Caron* case is noteworthy for two reasons. First, it is the first U.S. Supreme Court case to apply 18 U.S.C. § 921(a)(20)<sup>15</sup>—the federal statute designed to *exempt* state-convicted felons from federal firearms disabilities—which states:

What constitutes a conviction of such a crime [“punishable by imprisonment for a term exceeding one year”] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.<sup>16</sup>

Second, *Caron* qualifies the scope of 18 U.S.C. § 921(a)(20) and its ability to relieve a state-convicted felon of his 18 U.S.C. § 922(g)(1) firearms disability by laying out a bright-line test: “Either the restorations forbade possession of ‘firearms’ and the convictions count for all purposes, or they did not and the convictions count not at all.”<sup>17</sup>

In sum, *Caron* stands for the proposition that 18 U.S.C. § 921(a)(20) may relieve a state-convicted felon of the federal firearms disability imposed by 18 U.S.C. § 922(g)(1) if the state restoration processes the felon avails himself of do not restrict the type of firearms the individual is permitted to possess. Perhaps surprisingly, *Caron* has been cited by the Fourth Circuit only twice in the past fifteen years and with very little to show for it. One such citation concerns a canon of construction irrelevant to firearm rights restoration,<sup>18</sup> while the other, *United States v. Mowatt*<sup>19</sup> interestingly summarizes *Caron* as:

concluding that if state law places any restrictions on a defendant's ability to possess a firearm, then his previous conviction

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *United States v. Caron*, 941 F. Supp. 238 (D. Mass. 1996).

<sup>14</sup> *United States v. Caron*, 77 F.3d 1 (1st Cir. 1996) (en banc), *aff'd*, 524 U.S. 308 (1998).

<sup>15</sup> *Caron*, 524 U.S. at 309.

<sup>16</sup> 18 U.S.C. § 921(a)(20) (2012).

<sup>17</sup> *Caron*, 524 U.S. at 314.

<sup>18</sup> *See United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 514 n.4 (4th Cir. 2005) (rule of lenity).

<sup>19</sup> 74 F. App'x 250 (4th Cir. 2003) (per curiam).

falls within the definition of 18 U.S.C.A. § 921(a)(20), even if the defendant's civil rights have otherwise been restored and state law permitted the defendant to possess the firearms at issue.<sup>20</sup>

While similar, careful review of *Caron* in juxtaposition with *Mowatt*'s interpretation of *Caron* reveals that these two cases do not necessarily make mirrored observations, and that the Fourth Circuit's standard is not as brittle. *Caron* states that if the restorations forbid possession of firearms, then a federal conviction should stand; whereas if "[the restorations] did not . . . the convictions count not at all."<sup>21</sup> *Mowatt*, on the other hand, refers not to "restorations" but to whether "state law places any restrictions on a defendant's ability to possess a firearm."<sup>22</sup> This subtle distinction—over whether the restoration document itself or the "whole of state law"<sup>23</sup> controls whether a state-convicted felon may obtain relief from an outstanding federal firearms disability—is an issue that has caused at least one deeply rooted circuit split.<sup>24</sup> That said, the Fourth Circuit has consistently applied the "whole of state law"<sup>25</sup> in many published opinions, and for that reason state-convicted felons who have secured the unrestricted restoration of their firearm rights in a Virginia trial court are relieved of the federal firearm disability imposed by 18 U.S.C. § 922(g)(1).

## II. WHAT IS "THE LAW" IN THE FOURTH CIRCUIT AND WHAT HAS[N'T] THE COURT SAID ABOUT IT?

To be clear, the author has yet to discover any case in the Fourth Circuit where a state-convicted felon who obtained the unrestricted restoration of his firearm rights under applicable state law was prosecuted under 18 U.S.C. § 922(g)(1). Moreover, the author can say with certainty that no Fourth Circuit case has ever reported the 18 U.S.C. § 922(g)(1) prosecution of a Virginian who obtained the unrestricted restoration of his firearm rights pursuant to Virginia Code § 18.2-308.2(C), which states:

Any person prohibited from possessing, transporting or carrying a firearm or stun weapon . . . may petition the circuit court of the jurisdiction in which he resides for a permit to possess or carry a firearm or stun weapon; however, no person who has been convicted of a felony shall be qualified to petition for such a permit unless his civil rights have been restored by the Governor or other appropriate authority. A copy of the petition shall be mailed or delivered to the attorney for the Commonwealth for the jurisdiction

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<sup>20</sup> *Id.* at 252.

<sup>21</sup> *Caron*, 524 U.S. at 314.

<sup>22</sup> *Mowatt*, 74 F. App'x at 252 (emphasis added) (summarizing *Caron*).

<sup>23</sup> See *infra* note 56 and accompanying text.

<sup>24</sup> See *Buchmeier v. United States*, 581 F.3d 561, 572–73 (7th Cir. 2009) (en banc) (Sykes, J., dissenting) (identifying circuit split by collecting cases).

<sup>25</sup> See *infra* note 56 and accompanying text.

where the petition was filed who shall be entitled to respond and represent the interests of the Commonwealth. The court shall conduct a hearing if requested by either party. The court may, in its discretion and for good cause shown, grant such petition and issue a permit. The provisions of this section relating to firearms, ammunition for a firearm, and stun weapons shall not apply to any person who has been granted a permit pursuant to this subsection.<sup>26</sup>

This fact is likely a consequence of judicial precedent and Department of Justice prosecutorial policy. As the Department of Justice acknowledges in its U.S. Attorneys' Criminal Resource Manual, the reason no such case may be found results from prosecutorial recognition that "[i]n § 922(g)(1) cases based upon a State felony conviction, courts have uniformly looked to the law of the State where the conviction was obtained to determine whether the defendant's civil rights have been restored and whether such action has nullified the conviction's incidental prohibition on firearms possession."<sup>27</sup> Because of these cases, and as a matter of *policy*, "[t]he Criminal Division takes the position that where State law contains any provision purporting to restore civil rights—either upon application by the defendant or automatically upon the completion of a sentence—it should be given effect."<sup>28</sup> But what if the Justice Department changes its policy?

Despite the cases that implicate this issue and the Department of Justice's *current* policy, the Fourth Circuit's cases—while consistent with this interpretation—are not as unequivocally clear as other circuits on this issue; nor are they as clear as any attorney representing a state-convicted felon in this circuit or in Virginia should want them to be. Consequently, this Article calls on the Fourth Circuit, in an appropriate case, to make clear that *a defendant's "civil rights" have been restored under state law for purposes of 18 U.S.C. § 921(a)(20) if the state has also restored the defendant's right to possess firearms*. Due to the Supreme Court of Virginia's recent interpretation of the Constitution of Virginia in *Gallagher v. Commonwealth*,<sup>29</sup> which concluded that the governor lacked the authority to restore firearm rights and that only the state trial court could do so,<sup>30</sup> the failure by the Fourth Circuit to construe 18 U.S.C. § 921(a)(20) as suggested will have the unintended and disparate effect of failing to relieve *all* state-convicted felons in Virginia from their collateral federal firearm disabilities. To read 18 U.S.C. § 921(a)(20) as not removing a federal firearms disability when the felon has received the unrestricted restoration of his firearm rights by a Virginia trial court would yield a perverse result because the apparent purpose of this statute was to redirect the restoration process to the states. The longer this circuit proceeds without closing the

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<sup>26</sup> VA. CODE ANN. § 18.2-308.2(C) (West 2012).

<sup>27</sup> UNITED STATES ATTORNEYS' CRIMINAL RESOURCE MANUAL 1435 (1997), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm01435.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01435.htm).

<sup>28</sup> *Id.*

<sup>29</sup> 732 S.E.2d 22 (Va. 2012).

<sup>30</sup> *Id.* at 26.

door on this question, the longer attorneys unfamiliar with the nuances of Virginia's restoration regime—but who have had their clients' firearm rights restored pursuant to the state judicial proceeding afforded under Virginia Code § 18.2-308.2(C)—may inadvertently risk subjecting their clients to the “terrifying force of the criminal justice system”<sup>31</sup> once again.<sup>32</sup>

While the most thorough attorneys willing to initiate state firearm restoration proceedings on behalf of rehabilitated state-convicted felons will familiarize themselves with the intricacies of the collateral federal implications of state firearm restoration proceedings, akin to the implied requirement under *Padilla v. Kentucky*<sup>33</sup> that defense counsel advise her clients of potential removal consequences that flow from entering a guilty plea, the reality is that the law of firearms possession by rehabilitated state-convicted felons should be more clear and attorneys working with state-convicted felons through the process of restoring their firearm rights under state law should not be compelled to do so concerned that by removing one set of disabilities they are simultaneously exposing their client to the risk of others, such as a federal felon in possession conviction under 18 U.S.C. § 922(g)(1). By asserting with clarity this circuit's position, on which the weight of authority here already suggests it has adopted, the Fourth Circuit will sit more comfortably among its sister First, Sixth, Eighth, Tenth, and Eleventh circuits that unequivocally relieve, pursuant to 18 U.S.C. § 921(a)(20), state-convicted felons who have had their rights, including firearm rights, restored under state law, from the burden of the federal firearms disability imposed by 18 U.S.C. § 922(g)(1).

### III. HOW [MOST] FELONS LOST FIREARM RIGHTS IN THE FIRST PLACE (THE SHORT VERSION)

In *District of Columbia v. Heller*,<sup>34</sup> the United States Supreme Court proclaimed that “prohibitions on the possession of firearms by felons” were “longstanding.”<sup>35</sup> The

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<sup>31</sup> *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2185 (2010) (Roberts, C.J., dissenting), *dismissed as improvidently granted*.

<sup>32</sup> One might fairly question whether there is real danger that the Fourth Circuit would not conclude that § 921(a)(20) relieves the federal firearm disabilities of a state-convicted felon who has had his firearm rights restored under Virginia law. This concern is beside the point. The principal reason this Article seeks guidance from the Fourth Circuit is so that no United States Attorney in Virginia turns the hypothetical discussed here into a real-life controversy by indicting a state-convicted felon who has had his firearm rights restored under Virginia law only to argue to a district judge that the Virginia restoration fails to relieve the defendant's federal firearms disability. It is obviously the central premise of this Article that the great weight of the evidence suggests that the Fourth Circuit would enter judgment for the defendant if that unfortunate prosecution materialized. Consequently, the purpose of this Article is to solicit a few words from the Fourth Circuit so that an unknowing rehabilitated felon in Virginia may avoid participating as a defendant in a very unpleasant test case.

<sup>33</sup> 130 S. Ct. 1473 (2010).

<sup>34</sup> 554 U.S. 570 (2008).

<sup>35</sup> *Id.* at 626–27, 627 n.26.



problem with the Court's uncited proclamation is that "a lifetime ban on any felon possessing any firearm is not 'longstanding' in America. Nor . . . is it supported by the common law or the English right to have arms at the time of the Founding."<sup>36</sup> So if felon-firearm prohibitions are not grounded in the common law, where did the practice of felonizing felon access to firearms originate?

Former Justice Department official and firearms scholar C. Kevin Marshall's recent article, *Why Can't Martha Stewart Have a Gun?*,<sup>37</sup> cited over seventy-five times in four years (including citation by the audience of this Article, the U.S. Court of Appeals for the Fourth Circuit),<sup>38</sup> posits that "[f]or the quarter century before 1961, the original [Federal Firearms Act] had a narrow[ ] basis for . . . disability, limited to those convicted of a 'crime of violence.'"<sup>39</sup> Yet the contemporary prohibition on felon access to firearms is comfortably traced "to a 1961 amendment to the Federal Firearms Act of 1938," later expanded by Congress's Gun Control Act of 1968 to include the prohibition against any firearm that had ever traveled in interstate commerce.<sup>40</sup> The 1968 Act, which "established a comprehensive scheme regulating the manufacture, sale, transfer, and possession of firearms and ammunition,"<sup>41</sup> has not been without its critics or its flaws. In 1986, Congress acted in response to *Dickerson v. New Banner Institute, Inc.*,<sup>42</sup> a case decided in 1983 where the Supreme Court held that 18 U.S.C. § 922(g)(1), which made it unlawful for any person "who has been convicted . . . of . . . a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport . . . or to receive any firearm or ammunition . . . in interstate commerce,"<sup>43</sup> should be interpreted with reference to federal and not state law,<sup>44</sup> effectively utilizing the sword of the federal commerce power to eviscerate the ability of states to have any say on the firearm rights of felons in their midst.<sup>45</sup> The Court in *Dickerson* had held that the expunction of a

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<sup>36</sup> C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 697 (2009); see Alexander C. Barrett, Note, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 173 (2013) ("Whatever the reason for the inclusion of the limitations, examination of the opinion reveals that no justification for them was advanced other than the fact that they are 'longstanding.'"); see also *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) (questioning historical justification for permanent firearms bar on nonviolent felons).

<sup>37</sup> See Marshall, *supra* note 36.

<sup>38</sup> See *United States v. Chester*, 628 F.3d 673, 681 (4th Cir. 2010).

<sup>39</sup> See Marshall, *supra* note 36, at 699.

<sup>40</sup> *Id.* at 698.

<sup>41</sup> Brief of Appellant at 3–4, *Foltz v. Department of State Police*, No. 092319 (Va. Apr. 22, 2010); see 18 U.S.C. § 922(g)(1) (2012).

<sup>42</sup> 460 U.S. 103 (1983).

<sup>43</sup> 18 U.S.C. § 922(g)(1) (2012).

<sup>44</sup> See *Dickerson*, 460 U.S. at 111–12.

<sup>45</sup> See Daniel Brenner, Note, *The Firearm Owners' Protection Act and the Restoration of Felons' Right to Possess Firearms: Congressional Intent Versus Notice*, 2008 U. ILL. L. REV. 1045, 1054–55 (2008) (describing factual and procedural history of *Dickerson*).

state conviction did not nullify the conviction for purposes of the federal firearms statutes, stating that the need for uniformity arose from the difficulty of enforcing a rule that made firearm disabilities dependent upon state statutes that vary widely from state to state.<sup>46</sup> But instead of overturning a decision it thought to be wrong, Congress broadly weakened the Act by passing 18 U.S.C. § 921(a)(20),<sup>47</sup> which stated that what qualifies one for an exemption from a collateral federal firearm disability pursuant to 18 U.S.C. § 922(g)(1):

shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.<sup>48</sup>

This legislative response reflected Congress's solution to the unsettling reality that *Dickerson* sanctioned impermissible federal encroachment into the traditionally state sphere of criminal law. And although they did not arise immediately, the earliest cases interpreting 18 U.S.C. § 921(a)(20) supported this interpretation. The first federal appellate court to interpret 18 U.S.C. § 921(a)(20) was the Sixth Circuit in *United States v. Cassidy*.<sup>49</sup> The court opined that “[i]t was the unmistakable intent of Congress to eliminate the disabling effect of a felony conviction when the state of conviction has made certain determinations, embodied in state law, regarding a released felon’s civil rights and firearms privileges.”<sup>50</sup> The harder question the court considered was “whether Congress intended that a court look only to the document, if any, tendered to a felon upon release to determine whether his civil rights have been restored and whether there is an express limitation upon his firearms privileges.”<sup>51</sup> After reviewing the legislative history, the court concluded that “[i]t would frustrate the intent of Congress . . . to focus solely upon the document transferred to the convict upon release.”<sup>52</sup> “The intent of Congress,” the court explained:

was to give effect to state reforms with respect to the status of an ex-convict. A narrow interpretation requiring that we look

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<sup>46</sup> *Dickerson*, 460 U.S. at 120–22.

<sup>47</sup> Firearms Owners’ Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449, *as recognized in* Logan v. United States, 552 U.S. 23, 27–28 (2007).

<sup>48</sup> See 18 U.S.C. § 921(a)(20) (2012).

<sup>49</sup> 899 F.2d 543 (6th Cir. 1990).

<sup>50</sup> *Id.* at 546.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 548.

only to the document, if any, evidencing a restoration of rights, would frustrate the intent of Congress that we look to the whole of state law, including state law concerning a convicted felon's firearms privileges.<sup>53</sup>

Accordingly, the court held that if the felon has his rights restored by operation of state law, with or without a certificate or order documenting the event, a reviewing court "must look to the whole of state law of the state of conviction to determine whether the . . . 'felon' is entitled to vote, hold public office and serve on a jury and also whether [he] is entitled to exercise the privileges of shipping, transporting, possessing or receiving a firearm."<sup>54</sup>

The Fourth Circuit has repeatedly followed *Cassidy*'s lead "in determining whether the defendant's civil rights have been restored,"<sup>55</sup> and when deciding to relieve an individual from an 18 U.S.C. § 922(g)(1) disability pursuant to 18 U.S.C. § 921(a)(20) has declined to cabin its analysis to the language of the restoration document issued by the state, choosing instead to "look to the whole of state law."<sup>56</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 549.

<sup>55</sup> *United States v. Parks*, 442 F. App'x 23, 25 (4th Cir. 2011) (per curiam).

<sup>56</sup> *United States v. King*, 119 F.3d 290, 293 (4th Cir. 1997); *see, e.g., Parks*, 442 F. App'x at 25; *United States v. O'Neal*, 180 F.3d 115, 119 (4th Cir. 1999) ("In determining whether a 'restoration of civil rights expressly provides that the person may not . . . possess . . . firearms,' we look to the law of the jurisdiction of conviction . . . and consider the jurisdiction's entire body of law, not merely, for example, the jurisdiction's certificate of restoration of rights, received upon discharge of a conviction." (quoting 18 U.S.C. § 921(a)(20) (2012))); *United States v. Wagner*, 43 F.3d 1469 (4th Cir. 1994) (per curiam); *United States v. Walker*, 39 F.3d 489, 491 (4th Cir. 1994) ("[T]his Court has said that the whole of North Carolina law must be looked at to give effect to state reforms with respect to firearms." (internal quotation omitted)); *United States v. Johnson*, 7 F.3d 227 (4th Cir. 1993) (per curiam) ("The restoration of civil rights must be substantial, as determined by an examination of 'the whole of state law, including state law concerning a convicted felon's firearm privileges.'" (quoting *United States v. McLean*, 904 F.2d 216, 218 (4th Cir. 1990))); *United States v. Hassan El*, 5 F.3d 726, 734 (4th Cir. 1993); *United States v. Metzger*, 3 F.3d 756, 758 (4th Cir. 1993); *United States v. Clark*, 993 F.2d 402, 403 (4th Cir. 1993) ("We have held that when determining whether state law provides that a defendant's civil rights have been restored, the court must look 'to the whole of state law' and not just simply to the face of a certificate restoring to a defendant his civil rights." (citation omitted)); *United States v. McLean*, 904 F.2d 216, 218 (4th Cir. 1990) ("We agree with the rationale expressed by the *Cassidy* court and therefore look to the whole of [state] law 'to give effect to state reforms with respect to' firearm privileges accorded *McLean*." (citation omitted)); *see also* Madeline Stavis, Note, *Deactivating the Mousetrap: Entrapment by Estoppel as a Defense to Federal Felon-in-Possession Charges*, 32 *CARDOZO L. REV.* 655, 656 (2010) (identifying the Fourth Circuit as a "circuit that looks beyond the certificate to other statutes to determine [the felon's] right to carry firearms after his release, and therefore the applicability of the federal felon-in-possession statute.").

IV. *COMMONWEALTH V. GALLAGHER* AND THE CONSTITUTIONALLY COMPELLED  
“TWO-STEP PROCESS” FOR FIREARM RIGHTS RESTORATION IN VIRGINIA

Turning now to “the whole of state law”<sup>57</sup> in Virginia requires consideration of the Supreme Court of Virginia’s recent decision in *Gallagher v. Commonwealth*.<sup>58</sup> The *Gallagher* decision reversed a Virginia circuit court that concluded it lacked jurisdiction to restore a state-convicted felon’s firearm rights even after the applicant had his political disabilities removed by the governor of Virginia.<sup>59</sup> The Supreme Court of Virginia concluded that the circuit court was in error because it looked only to the governor’s order removing the applicant’s political disabilities.<sup>60</sup> The order explicitly declined to restore his “right to ship, transport, possess or receive firearms.”<sup>61</sup>

*Gallagher* explained that the Constitution of Virginia and the separation of powers principles embodied therein prohibit the governor from restoring a state-convicted felon’s firearm rights.<sup>62</sup> Although the governor is empowered to issue a felon a pardon or to remove a felon’s political disabilities—including the right to vote, hold public office, serve on a jury, and to be a notary public<sup>63</sup>—for a convicted felon to have his “civil rights restored”<sup>64</sup> in Virginia, he must avail himself to the “two-step process”<sup>65</sup> of (1) having his political disabilities removed by the governor, followed by (2) receipt of an unrestricted order restoring firearm rights issued upon petition to a Virginia state circuit court.<sup>66</sup> Consequently, *Gallagher*’s scope reaches beyond Virginia law and affects the federal rights of Virginia-convicted felons because it clarifies the definition of “rights” that constitute “civil rights” under Virginia law for the purpose of removing collateral federal firearm disabilities provided for by 18 U.S.C. § 921(a)(20).<sup>67</sup> Any

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<sup>57</sup> See *supra* note 56 and accompanying text.

<sup>58</sup> 732 S.E.2d 22 (Va. 2012).

<sup>59</sup> *Id.* at 24.

<sup>60</sup> *Id.* at 27.

<sup>61</sup> *Id.* at 24.

<sup>62</sup> *Id.* at 25 (“If the executive clemency power were construed to include the restoration of firearm rights, then Code § 18.2-308.2(C), insofar as it grants the circuit courts jurisdiction to restore them, would not only be redundant, but would be an unconstitutional intrusion by one branch of government on the powers of another.”).

<sup>63</sup> *Id.* at 26 (“We construe the term ‘power to . . . remove political disabilities,’ contained in Article V, Section 12 of the Constitution, not to include the power to restore firearm rights.”).

<sup>64</sup> *Id.* (“Thus, the Governor is empowered to remove political disabilities, but not to restore all rights lost as a result of a felony conviction. The jurisdiction to restore firearm rights lost in those circumstances is vested solely in the circuit courts.”).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *United States v. Sonczalla*, 561 F.3d 842, 844 (8th Cir. 2009) (“We have noted that for a person to have his civil rights restored by a state for the purposes of section 921(a)(20), the relevant state must actually have restored the felon’s right to possess firearms.” (internal quotation marks omitted)).

federal court within the Fourth Circuit seeking to “look to the whole of state law”<sup>68</sup> in Virginia to determine whether a Virginian who has successfully secured an order restoring his firearm rights from a state circuit court is relieved of his federal firearms disability, under 18 U.S.C. § 922(g)(1) pursuant to 18 U.S.C. § 921(a)(20), need look no further than the *Gallagher* decision.

Because “the whole of state law”<sup>69</sup> in Virginia (in essence, *Gallagher*) unequivocally prohibits the governor of Virginia from restoring firearm rights, the receipt of an unrestricted order restoring firearm rights entered by the Virginia state circuit court where the felon resides causes a state-convicted felon resident of Virginia to be relieved of his federal firearms disability under 18 U.S.C. § 922(g)(1) pursuant to 18 U.S.C. § 921(a)(20). Indeed, as the Fourth Circuit stated in *United States v. Etheridge*<sup>70</sup>:

Section 18.2-308.2(C) of the Virginia Code provides the method by which a convicted felon may receive a permit to possess a firearm. The procedure requires that a petition be filed with the circuit court of the jurisdiction in which the felon resides requesting a permit to possess or carry a firearm. The court may in its discretion and for good cause shown grant the petition . . . . If appellant had successfully completed this process, he would have been able to claim under 18 U.S.C. § 921(a)(20) that his civil rights had been restored.<sup>71</sup>

Surprisingly, *Etheridge* is the only Fourth Circuit case, of the thirty-three reported federal cases that cite Virginia Code § 18.2-308.2(C), that provides any insight whatsoever into this code section’s interplay with the federal firearms disability regime.

The relationship between Virginia state law interpreted in *Gallagher* and 18 U.S.C. § 921(a)(20) suggested herein is consistent with how other federal circuits have understood state rights-restorations to relieve federal firearms disabilities under 18 U.S.C. § 921(a)(20).<sup>72</sup> However, Governor McAuliffe should consider clarifying the

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<sup>68</sup> See *supra* note 56 and accompanying text.

<sup>69</sup> *Id.*

<sup>70</sup> 932 F.2d 318 (4th Cir. 1991).

<sup>71</sup> *Id.* at 322, 322 n.2; see also *Restoration of Firearm Rights*, VIRGINIA STATE POLICE, [http://www.vsp.state.va.us/Firearms\\_Restoration.shtm](http://www.vsp.state.va.us/Firearms_Restoration.shtm) (last visited Oct. 23, 2014) (“The removal of *federal firearms disabilities* imposed by a *state* felony conviction will *automatically result* where there has been a restoration of all civil rights; *i.e.*, the right to vote, hold public office, be a juror, and an *unrestricted* restoration of a person’s rights under state law to receive and possess firearms. An example of a restricted permit is one that limits the purchase, possession or transportation of a firearm to rifles or shotguns, only, for the purpose of hunting.” (emphasis added)).

<sup>72</sup> See, e.g., *United States v. Baker*, 508 F.3d 1321, 1328 (10th Cir. 2007) (“A defendant’s civil rights have been restored under state law for purposes of § 921(a)(20) if the state has also restored the defendant’s right to possess firearms.”); *United States v. Tait*, 202 F.3d 1320,

Commonwealth's removal of political disabilities certificate by amending the operative clause to read as follows:

NOW, THEREFORE, I, Terence Richard McAuliffe, Governor of the Commonwealth of Virginia, by virtue of the authority vested in me, do hereby remove the political disabilities, except the right to ship, transport, possess or receive firearms (which may be restored in accordance with procedures set forth in Virginia Code § 18.2-308.2(C)), under which he/she labors by reason of his/her conviction(s) as aforesaid, and do hereby restore his/her rights to vote, hold public office, serve on a jury, and to be a notary public.

#### V. FEDERALLY CONVICTED FELONS AND BARS TO RELIEF FROM FEDERAL FIREARMS DISABILITIES

Unfortunately for federally convicted felons, it is not presently possible to obtain the restoration of firearm rights by way of judicial relief. Functionally, the only way at present for a federally convicted felon to be relieved of federal firearm disabilities is to secure a pardon from the Attorney General.<sup>73</sup> Although 18 U.S.C. § 925(c) provides a judicial avenue for obtaining relief, Congress has declined to provide funding to the Treasury Department for such endeavors,<sup>74</sup> and the U.S. Supreme Court has declined to enjoin Congress's decision, although it did weigh in to say that mere "inaction" on the Bureau of Alcohol, Tobacco and Firearms' part was not akin to "denial" of relief as to give rise to a due process problem.<sup>75</sup> Nevertheless, while no circuit court has

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1324 n.6 (11th Cir. 2000) ("The *Caron* court noted, in the context of a discussion of § 922(g), that state laws provide the source of law for determining restoration issues, as well as for determining whether a former felon is too dangerous to possess a firearm. In other words, federal law uses state findings to determine whether the federal law has been violated." (citations omitted)); *United States v. Dockter*, 58 F.3d 1284, 1290 (8th Cir. 1995) (explaining that "for a person to have his civil rights restored by a state for the purposes of section 921(a)(20), the relevant state must actually have restored the felon's right to possess firearms." (quotations omitted)); *United States v. Ramos*, 961 F.2d 1003, 1008–09 (1st Cir. 1992) (holding that the term "restored" in § 921(a)(20) requires the state to make an "individualized official judgment" that the defendant should be excepted from the prohibitions of § 922(g)(1)); *United States v. Burns*, 934 F.2d 1157, 1160 (10th Cir. 1991) (concluding that defendant did not have his civil rights restored because defendant did not have the right to possess firearms).

<sup>73</sup> See 18 U.S.C. § 925(c) (2012).

<sup>74</sup> See *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007); see also *United States v. Wiggins*, 50 F. Supp. 2d 512, 513 (E.D. Va. 1999).

<sup>75</sup> *United States v. Bean*, 537 U.S. 71, 75–76 (2002). For a compelling look at the real-world impact of the *Bean* decision on individuals who are not "career criminals," see generally Mark M. Stavsky, *No Guns or Butter for Thomas Bean: Firearm Disabilities and Their Occupational Consequences*, 30 *FORDHAM URB. L.J.* 1759 (2003).

yet held that *Heller* “as-applied” penetrates § 922(g)(1) to the benefit of any particular felon or misdemeanor who has not previously had his firearm rights restored, some circuits have left the door to such a challenge open, while others have already foreclosed it.<sup>76</sup>

Initially, in *United States v. Edwards*<sup>77</sup> and *United States v. Geyler*,<sup>78</sup> two federal circuit courts held that a state restoration of rights relieved federally convicted felons of their federal firearms disabilities pursuant to 18 U.S.C. § 921(a)(20).<sup>79</sup> However, the U.S. Supreme Court disagreed in *Beecham v. United States*.<sup>80</sup> The *Beecham* case has been subsequently cited in eighty-six reported cases. Of the five Fourth Circuit cases that cite it, only three—*Jennings*, *Rhynes I*, and *Rhynes II*—deal with firearm-related matters,<sup>81</sup> and none of those five cases question its limited application to individuals who labor under disabilities imposed by federal felony convictions.<sup>82</sup>

*Jennings* is not a material case for firearm rights restoration purposes, but it is of note for those concerned with firearm rights prohibitions because it is the benchmark Fourth Circuit case upholding the federal prohibition against firearm possession for individuals convicted of misdemeanor crimes of domestic violence.<sup>83</sup> But what qualifies as a “misdemeanor crime of domestic violence”?

Interestingly, from June 2010 through March 2014 there was a legitimate argument that not all Virginians convicted of “a misdemeanor crime of domestic violence” under 18 U.S.C. § 922(g)(9) were barred from transporting, possessing, carrying, or receiving firearms in Virginia. The genesis for this contention arose from the Fourth Circuit’s

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<sup>76</sup> See Barrett, *supra* note 36, at 176–77 (cataloging the post-*Heller* “as-applied” challenges to 18 U.S.C. § 922(g)(1) and acknowledging that the Third, Fourth, and Seventh circuits have recognized the possibility of success of such a claim, whereas the Ninth, Tenth, and Eleventh circuits have foreclosed this possibility). Subsequent to the publication of Mr. Barrett’s Note, the D.C. Circuit appears to have aligned with the circuits that take the former view. See *Schrader v. Holder*, 704 F.3d 980, 991 (D.C. Cir. 2013) (“[W]e would hesitate to find *Schrader* outside the class of ‘law-abiding, responsible citizens’ whose possession of firearms is, under *Heller*, protected by the Second Amendment. . . . But we need not wade into these waters because plaintiffs never argued in the district court that section 922(g)(1) was unconstitutional as applied to *Schrader*.” (internal citations omitted)).

<sup>77</sup> 946 F.2d 1347 (8th Cir. 1991).

<sup>78</sup> 932 F.2d 1330 (9th Cir. 1991).

<sup>79</sup> *Edwards*, 946 F.2d at 1349; *Geyler*, 932 F.2d at 1333–34.

<sup>80</sup> 511 U.S. 368 (1994).

<sup>81</sup> See generally *United States v. Jennings*, 323 F.3d 263 (4th Cir. 2003); *United States v. Rhynes*, 206 F.3d 349 (4th Cir. 1999); *United States v. Rhynes*, 196 F.3d 207 (4th Cir. 1999).

<sup>82</sup> See, e.g., *Worden v. Suntrust Banks, Inc.*, 549 F.3d 334, 346 n.9 (4th Cir. 2008) (citing *Beecham* only for its language on statutory interpretation); *United States ex rel. Wilson v. Graham Cnty. Soil & Water Conservation Dist.*, 528 F.3d 292, 302 (4th Cir. 2008) (same); *Jennings*, 323 F.3d at 271 (introducing *Beecham* only briefly and only through the quoted text of a different case); *Rhynes*, 206 F.3d at 376–77 (citing *Beecham* to only note the defendant’s civil rights were not restored under federal law); *Rhynes*, 196 F.3d at 234–35 (same).

<sup>83</sup> See *Jennings*, 323 F.3d at 263, 274–75.

decision in *United States v. White*.<sup>84</sup> In *White*, a panel of the Fourth Circuit reversed and vacated a federal conviction imposed pursuant to § 922(g)(9) after it construed the phrase “physical force” in 18 U.S.C. § 921(a)(33)(A)(ii) to mean “force, greater than a mere offensive touching, that is capable of causing physical pain or injury to the victim.”<sup>85</sup> In other words, the court concluded that “physical force” meant “violent force.”<sup>86</sup> This interpretation of Va. Code § 18.2-57.2(A) (“Any person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor”) meant that absent explicit evidence of the use of violent force on the underlying conviction order, a conviction under this provision did not subject the recipient to the § 922(g)(9) prohibition from interacting with firearms.

Unfortunately for domestic violence misdemeanants who seek to interact with firearms in Virginia today, whatever refuge from federal prosecution *White* may have sheltered them from likely terminated in the wake of the United States Supreme Court’s decision in *United States v. Castleman*.<sup>87</sup> Like *White*, *Castleman* was convicted of a state crime fairly characterized as a crime of domestic violence and subsequently indicted under § 922(g)(9), the federal prohibition against interaction with firearms by domestic violence misdemeanants.<sup>88</sup> However, unlike *White*, *Castleman* was convicted of having “intentionally or knowingly cause[d] bodily injury to the mother of his child, in violation of Tenn. Code Ann. § 39-13-111(b).”<sup>89</sup> Notably, *Castleman*’s conviction did not contain the same ambiguities surrounding “physical force” that *White* was able to bring to the court’s attention by virtue of Virginia’s significantly vaguer statute, which both lacked an explicit *mens rea* and was silent regarding “bodily injury” (unlike Tennessee’s statute).<sup>90</sup>

In *Castleman*, the Supreme Court declined to prioritize these nuances in state law over the plain, broad, meaning of the phrase “physical force.”<sup>91</sup> The Court held that the definition of battery implicated by federal law’s misdemeanor crime of violence prohibition against firearms was the common law definition of battery—i.e., any intentional, offensive, use of “physical force”—not merely, as *White* had held, “violent force.”<sup>92</sup> The Court explained further that intentional, offensive touching constituting battery implicating the federal firearms prohibition included the use of any physical mechanism, even an indirect one, that caused any physical injury: for example, inducing the domestic violence victim to ingest poison.<sup>93</sup>

<sup>84</sup> 606 F.3d 144 (4th Cir. 2010).

<sup>85</sup> *Id.* at 156.

<sup>86</sup> *Id.* at 153.

<sup>87</sup> 134 S. Ct. 1405 (2014).

<sup>88</sup> *Id.* at 1409.

<sup>89</sup> *Id.* (internal quotation marks omitted).

<sup>90</sup> Compare *Castleman*, 134 S. Ct. at 1409, with *White*, 606 F.3d at 147 n.3.

<sup>91</sup> *Castleman*, 134 S. Ct. at 1413.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1415.



In light of the foregoing, it is difficult to read *Castleman* and not conclude that it overrules *White sub silencio*.<sup>94</sup> Consequently, a prudent attorney counseling a client who has been convicted under Va. Code § 18.2-57.2 should inform the client that he faces a substantial likelihood—a greater likelihood than not—of federal prosecution if he has been convicted of violating Va. Code § 18.2-57.2, chooses to interact with firearms, and is caught doing so by law enforcement. If the client was convicted of a crime that could reasonably be construed by a court as a crime of domestic violence in another state, but desires to interact with firearms in Virginia, a prudent attorney must obtain the underlying order of conviction and review the text of the foreign jurisdiction's offense as it read at the time the conviction was imposed. Failure to faithfully investigate each of these steps risks exposing the client to federal prosecution.

Do juvenile adjudications rendered in Virginia impose the same 18 U.S.C. § 922(g) firearms disability on the recipient as a domestic violence misdemeanor conviction? No, so holds *United States v. Walters*.<sup>95</sup> In *Walters*, three defendants were the subjects of juvenile adjudications under Virginia law and each subsequently possessed a firearm resulting in their indictments under § 922(g)(1)'s prohibition against firearm possession after having been convicted of a crime punishable by more than one year of imprisonment.<sup>96</sup> The defendants moved to dismiss their indictments, arguing that their juvenile adjudications did not place them in the class of persons prohibited from firearm possession under § 922(g)(1).<sup>97</sup> The Fourth Circuit agreed and held that a juvenile adjudication under Virginia law does not constitute a felony conviction giving rise to a § 922(g) firearms disability.<sup>98</sup> The Virginia Court of Appeals' subsequent decision in *Conkling v. Commonwealth*<sup>99</sup> cites *Walters* approvingly and notes that “[t]he rule in Virginia has been clear for some time that proceedings in juvenile court are civil, and not criminal, in nature.”<sup>100</sup> Consequently, it is crystal clear that a juvenile adjudication rendered under Virginia law does not bar an individual from transporting, possessing, carrying, or receiving firearms in Virginia, and subsequent case law suggests that this holding applies similarly within the Fourth Circuit outside Virginia.<sup>101</sup>

Unlike individuals subjected to juvenile adjudications, who, as just stated, are not subject to the § 922(g) bar, the fact that misdemeanants—including misdemeanants convicted of domestic violence—do not lose their civil rights has made it more difficult for them to obtain the restoration of their firearm rights. But as the Fourth Circuit

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<sup>94</sup> See, e.g., *United States v. Castleman*, 695 F.3d 582, 586 (6th Cir. 2012) (“The Fourth Circuit recently came to the same conclusion in *United States v. White . . .*”), *rev'd*, 134 S. Ct. 1405 (2014).

<sup>95</sup> 359 F.3d 340, 344–45 (4th Cir. 2004) (interpreting VA. CODE ANN. § 16.1-308).

<sup>96</sup> *Id.* at 341.

<sup>97</sup> *Id.* at 342.

<sup>98</sup> *Id.* at 346.

<sup>99</sup> 612 S.E.2d 235 (Va. Ct. App. 2005).

<sup>100</sup> *Id.* at 238–39 (quoting 87–88 Op. Va. Att’y Gen. 260–61 (1988)).

<sup>101</sup> See, e.g., *United States v. Wright*, 594 F.3d 259, 265 n.2 (4th Cir. 2010) (“South Carolina law contains a similar provision.” (citing S.C. CODE § 63-19-1410(C))).

recognized in *Jennings*, there are “avenues [domestic violence misdemeanants] can pursue to fall within the restoration exception of 18 U.S.C. § 921(a)(33)(B)(ii); namely, pardon and expungement.”<sup>102</sup> So how would the options outlined in *Jennings* apply in Virginia?

#### A. Pardon

With respect to the impact of a pardon issued by the Governor of Virginia on a state-convicted felon’s firearm rights, the *Gallagher* decision’s citation to Virginia Code § 18.2-308.2(A)’s reference to Article V, Section 12 of the Constitution of Virginia seems to suggest that, unless the pardon explicitly states to the contrary, recipients of pardons issued by the governor must still obtain an order restoring firearm rights from the firearm rights restoration proceeding outlined in Virginia Code § 18.2-308.2(C) in order for a state-convicted felon to secure the restoration of firearm rights under state law.<sup>103</sup>

#### B. Expungement

With respect to the impact of an expungement on a state-convicted felon’s firearm rights, it is worth noting that while 18 U.S.C. § 921(a)(20) identifies “expungement” as one of four methods available for relief from a federal firearms disability under 18 U.S.C. § 922(g)(1),<sup>104</sup> at least with respect to state-convicted felons in Virginia, this purported remedy is merely a statutory mirage. Expungements in Virginia are available pursuant to Virginia Code § 19.2-392.2 when a defendant is (1) acquitted; (2) a nolle prosequi is taken; or (3) the charge is “otherwise dismissed,” which has been interpreted by the Supreme Court of Virginia to mean “innocent” and not to mean dismissed upon the completion of terms and conditions.<sup>105</sup> Thus, regardless of whether an individual is acquitted, the Commonwealth’s Attorney exercises his option to take a nolle prosequi, or the charge is “otherwise dismissed,” in Virginia he has no need to seek an expungement because none of the predicate circumstances for which an expungement is an available remedy occurred. While some states may permit an individual convicted of a felony long ago to have it removed from his record via expungement, Virginia permits an expungement only when, absent acquittal or a nolle prosequi, the underlying charge has been “otherwise dismissed” as described above.<sup>106</sup> The fact that this avenue, which federal law purports to provide, is nothing more than a statutory mirage provides one more policy reason that Virginia’s two-part proceeding for the restoration of firearm rights under state law relieves successful applicants of collateral federal firearms disabilities.

<sup>102</sup> *United States v. Jennings*, 323 F.3d 263, 274 (4th Cir. 2003).

<sup>103</sup> *See Gallagher v. Commonwealth*, 732 S.E.2d 22, 24–26 (Va. 2012).

<sup>104</sup> 18 U.S.C. § 921(a)(20) (2012) (“Any conviction which has been expunged . . . shall not be considered a conviction for purposes of this chapter . . .”).

<sup>105</sup> *See Brown v. Commonwealth*, 677 S.E.2d 220, 223–26 (Va. 2009).

<sup>106</sup> *See id.*

To summarize, the most important fact to take away from the Supreme Court's *Beecham* decision is that it deals with federally convicted felons, for whom a state firearm rights restoration proceeding will yield no benefit because it will not relieve the felon of his federal firearms disability. Neither it nor any of the Fourth Circuit cases that cite it alter the compelling arguments why Virginians who have secured an unrestricted restoration of firearm rights pursuant to § 18.2-308.2(C) are relieved of any collateral federal firearms disability imposed under 18 U.S.C. § 922(g)(1) pursuant to 18 U.S.C. § 921(a)(20).

#### CONCLUSION

While there is no “one size fits all” set of laws barring felons from possessing firearms for life in Virginia, the parameters for when individuals with history in the criminal justice system may involve themselves with firearms are complex and, if pursued in haphazard fashion, can have draconian consequences. The cases make clear that “ignorance of the illegality of one’s possession of weapons, even when based upon statements by state officials, is not a defense, incomplete or otherwise, to charges under § 922(g)(1),”<sup>107</sup> and good faith mistakes by state-convicted felons arising from post-conviction possession of firearms have exposed felons to prosecution and resulted in convictions.<sup>108</sup> Even the most persistent *federal* felon is unlikely to secure the full restoration of his rights, including firearm rights, soon after release from incarceration. However, if the proper amount of attention is paid to the nuanced interplay between

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<sup>107</sup> *United States v. Blackburn*, 958 F.2d 369 at \*2 (4th Cir. 1992) (per curiam) (unpublished).

<sup>108</sup> *See Farnsworth v. Commonwealth*, 613 S.E.2d 459, 460 (Va. 2005) (affirming conviction for “knowingly and intentionally possessing a firearm after being convicted of a felony in the Commonwealth or in any other state, in violation of [Virginia] Code § 18.2-308.2” by an individual previously convicted of a felony under state law in West Virginia but who had received a certificate from the West Virginia Department of Corrections indicating that “[a]ny and all civil rights heretofore forfeited are restored”). It could be argued that Virginia should have been compelled to recognize West Virginia’s state restoration that was silent as to firearm rights under Article IV, Section 1 of the U.S. Constitution and 28 U.S.C. § 1738, commonly known as the “Full Faith and Credit Clause.” However, upon further research, it appears that West Virginia’s restoration certificate issuing process, given short shrift in the *Farnsworth* case, is more nuanced than it appears from the opinion. In *United States v. Herron*, 38 F.3d 115 (4th Cir. 1994), the Fourth Circuit reversed a U.S. district court sitting in West Virginia that had dismissed an indictment issued under 18 U.S.C. § 922(g)(1) because, although West Virginia’s state restoration certificate was silent as to firearm rights, West Virginia state law offered a restoration proceeding (akin to Virginia’s) to have Herron’s firearm rights restored under state law (and, ostensibly, his incidental federal disabilities removed). *Id.* at 117–18 (citing W. VA. CODE § 61-7-7). Consequently, the suggestion that Virginia owed Farnsworth the full faith and credit of West Virginia’s restoration would probably be most compelling if Farnsworth had first received the restoration of his firearm rights under West Virginia state law (which from the case is not clear that he did, nor is it clear the Virginia Court of Appeals was aware that West Virginia provided such an opportunity under its state law) prior to his prosecution as a felon in possession under state law in Virginia.

Fourth Circuit case law and the state rights-restoration process in Virginia initiating with an application for the removal of political disabilities to the Secretary of the Commonwealth, it becomes clear that rehabilitated *state*-convicted felons who have successfully secured the restoration of firearm rights under state law are relieved of any incidental federal firearms disability as the result of the interplay between 18 U.S.C. § 922(g)(1), 18 U.S.C. § 921(a)(20), state rights-restoration processes, and the case law cited in this Article.



**COMMONWEALTH of VIRGINIA**  
*Executive Department*

**TO ALL TO WHOM THESE PRESENTS SHALL COME — GREETINGS:**

WHEREAS, [redacted] after being convicted and sentenced for crime(s) at the dated hearing(s) held in and for the city or county court(s) noted below;

**City of Richmond Circuit Court**  
[redacted]

**County of Amelia Circuit Court**  
[redacted]

WHEREAS, [redacted], by reason of conviction(s), suffers political disabilities, to wit: denial of the right to vote, to hold public office, to serve on a jury, to be a notary public and to ship, transport, possess or receive firearms; and

WHEREAS, it appears that all sentence obligations have been fulfilled and it seems appropriate to the Executive to remove certain of his political disabilities by restoring his right to vote, hold public office, serve on a jury, and to be a notary public;

NOW, THEREFORE, I, Robert F. McDonnell, Governor of the Commonwealth of Virginia, by virtue of the authority vested in me, do hereby remove the political disabilities, except the right to ship, transport, possess or receive firearms, under which he labors by reason his conviction(s) as aforesaid, and do hereby restore his rights to vote, hold public office, serve on a jury, and to be a notary public.

Given under my hand and under the Lesser Seal of the Commonwealth at Richmond, on [redacted] 2013 in the 238th year of the Commonwealth.



Governor of Virginia

Secretary of the Commonwealth